IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0054

STATE OF MONTANA,

Plaintiff and Appellee,

v.

GLEN D. SPOTTED EAGLE, SR.,

Defendant and Appellant.

# BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, The Honorable David G. Rice, Presiding

APPEARANCES:

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## STATEMENT OF ISSUE

1. Whether the State's submission of amended jury instructions after the trial had begun was a substantive amendment, in effect, changing the charge?

2. As an amendment to the substance of the charge, was it timely?

3. Were the Defendant's constitutional rights violated by the introduction of new jury instructions at trial?

## STATEMENT OF FACTS

The State has alleged on April 3, 2009, in Havre, Hill County Montana, Glen Spotted Eagle (Spotted Eagle) purposely or knowingly caused bodily injury to his common law wife, Michelle Gobert (Gobert) in violation of Mont. Code Ann. § 45-5-206. (D.C. Doc. 3.) The State's Motion and Affidavit state the following:

> On April 3, 2009, officers were dispatched to the 700 block of 3rd Ave. in Havre Montana. A witness, Jacom Crebs, reported he saw a male hit a female. Officer Thad White and Sgt. Michael LaBaty located the couple. The male was walking in front of the female and she was yelling at him. The male was identified as Glen Spotted Eagle and the female was identified as Michelle Gobert. LaBaty exited the patrol car and ordered the two to stop walking. La Baty stepped back to speak with Gobert. She denied anything took place. She had blood in the corner of her mouth. She was not cooperative with the investigation. LaBaty spoke with the witness, Jarom Crebs. Crebs told police he heard the two arguing. As they argued, he saw Spotted Eagle hit Gobert on the left side of the face with an open right hand. Crebs yelled at the two and informed them he was going to call the police. They began to argue again and Crebs went inside the building to call.

(D.C. Doc. 1.)

The State moved the court for an "Order Granting Leave to File Information Direct" on April 6, 2009. The State further requested the district court issue a Warrant of Arrest and set bail in the amount of $10,000.00. (D.C. Doc. 1.)

## STATEMENT OF CASE

The State charged Spotted Eagle, by Information on or about April 7, 2009. (D.C. Doc. 3.) In the Information, the State alleged Spotted Eagle committed two separate offenses: Count I, Partner or Family Member Assault, 3rd of subsequent offense, a Felony, and in Count II, Failure of Disorderly Person to Disperse, a misdemeanor. (D.C. Doc. 3) Spotted Eagle subsequently pled "not guilty," was eventually released on bond, and the matter was set for trial September 10, 2009.

During the Defendant's trial, after all testimony had been heard and both parties had rested, the State sought to introduce a new Jury Instructions "3-A" and "4-A." (Tr. at 119-23.) Prior to accepting the instructions, Judge Rice asked the State why it was submitting the new instructions. (Tr. at 119-20.) The State reasoned there was evidence of both injury and reasonable apprehension of bodily harm or one or the other. (Tr. at 119-20.)

Defense counsel objected to the two new instructions, arguing that they essentially amended the charge. The district court noted the objections by defense

counsel, overruled them, and allowed the State's two new instructions. (Tr. 119-23.)

The jury found the Defendant guilty of both counts and Spotted Eagle was sentenced to four years to Department of Corrections with all four years suspended. (D.C. Doc. 92.)

Spotted Eagle filed a motion for a new trial based in part on the State submitting new instructions midway through the trial and not with the original instructions submitted eight days earlier. (D.C. Doc. 75.) The district court denied Spotted Eagle's Motion for a new trial. (D.C. Doc. 88.) Spotted Eagle now files this timely appeal.

## SUMMARY OF THE ARGUMENT

Montana statute provides for amendments to an information up until the time of the verdict. The courts have further parsed this issue ensuring two criteria are met: so long as 1) there is only amendment as to form and not substance and 2) only when there is no substantial prejudice to the rights of the defendant.

In this case, there was an amendment as to substance *and* a substantial right of the defendant was prejudiced. Spotted Eagle prepared a defense based upon the charging documents and when the State's case weakened at trial, the State sought to amend the elements of the offense so as to fit the case as it had played out at trial.

This Court must hold the amendment should not have been allowed, reverse the conviction and remand the case to the district court for a new trial.

## STANDARD OF REVIEW

This Court reviews issues concerning jury instructions to determine if there was an abuse of discretion. *State v. English*, 2006 MT 177, 333 Mont. 23, 140 P.3d 454. "Jury instructions are reviewed to determine whether the instructions as a whole fully and fairly instruct the jury on the applicable law." *English*, ¶ 39 (quoting *State v. Pittman*, 2005 MT 70, ¶ 30, 326 Mont. 324, 109 P.3d 237).

## ARGUMENT

### I. THE STATE'S SUBMISSION OF AMENDED JURY INSTRUCTIONS AFTER THE TRIAL HAD BEGUN WAS A SUBSTANTIVE AMENDMENT, IN EFFECT, CHANGING THE CHARGE.

In *City of Red Lodge v. Kennedy*, 2002 MT 89, 309 Mont. 330, 46 P.3d 602, the Court held, "To differentiate amendments of form and substance, we examine whether an amendment to an information or complaint alters the nature of the offense, the essential elements of the crime, the proofs or the defenses." *Kennedy*, ¶ 14.

In *Kennedy*, the prosecution sought to amend the complaint on the day of the trial, alleging new facts and expanding its use of the stalking statute to include other elements not originally cited in the original charging documents. *Kennedy*, ¶ 14. The trial court permitted these amendments and the defendant was

subsequently convicted. *Kennedy*, ¶ 9. On appeal, the Montana Supreme Court reversed, holding the amended complaint to be an amendment as to substance. *Kennedy*, ¶ 17. The Court held changing a word or adding a word may not qualify as a change in substance, but charging under a different subsection of a statute requires new proof and defenses. *Kennedy*, ¶¶ 14-15 (emphasis added).

Similarly, in the case at hand, when the State sought to offer a new jury instruction on reasonable apprehension of bodily harm, subsection (c) under the Partner Family Member Assault statute, this amounted to a change in substance and not merely a change as to form. Spotted Eagle prepared for trial under the premise the State was trying to prove bodily injury to the victim and when the testimony at trial did not support bodily injury, the State sought to expand its net to better fit the facts elicited at trial.

Another case supporting Spotted Eagle's contention the jury instruction was an amendment as to substance is *State v. Hallam*, 175 Mont 492, 575 P.2d 55 (1978). In *Hallam*, the defendant was charged with one count of arson and three counts of deliberate homicide and on the opening day of trial, the State sought to amend the arson count, charging the defendant under subsection (b) of the arson statute rather than subsection (a). *Hallam*, 175 Mont. at 499, 575 P.2d at 60. The district court permitted the change, saying this was only as to form. *Hallam*, 175

Mont. at 499, 575 P.2d at 60. The defendant was convicted, and an appeal was filed.

On appeal, the Montana Supreme Court held the State's motion to amend the arson charge from one subsection of the statute to another subsection, was indeed an amendment as to substance. *Hallam*, 175 Mont. at 499, 575 P.2d at 61. The Court analyzed it under the two-pronged test set forth in an earlier decision, *State v. Brown*, 171 Mont. 41, 560 P.2d 533 (1967) "(1) such an amendment is allowed only as to matters of form, and (2) only when no substantial right of the defendant is prejudiced. . . ." *Hallam*, 175 Mont. at 500, 575 P.2d at 61, *citing Brown*, 171 Mont. at 41, 43 560 P.2d at 535.

It stands to reason, because of the Court's intentional use of the conjunction "and," if the amendment is to substance the analysis need not go any further.

In *Brown,* the State amended the charge of aggravated assault from "serious bodily injury," subsection "a" of the aggravated assault statute, to one of "reasonable apprehension of serious bodily injury," subsection "c" of the statute. *Brown*, 171 Mont. at 43, 560 P.2d at 45-46. This Court held amending the charge violated Revised Codes of Montana 1947 § 95-1505. In reaching its conclusion in *Brown*, the Court relied on the test set forth *State v. Stewart*, 161 Mont. 501, 507 P.2d 1050:

> The question to be decided by this Court is whether the amended information charged a crime different in nature from that previously

> charged, *and* if such amendment sufficiently apprised the defendant of the charges against him. (Emphasis supplied.) . . . The crime charged is the same . . . . The elements are the same. The proof to the crime would remain the same.

*Brown*, 171 Mont. at 44, 560 P.2d at 534-35, *citing Stewart*, 161 Mont. at 504, 507 P.2d at 1052.

The Court held in *Brown*, changing from the charge of bodily injury to reasonable apprehension of bodily injury is a change as to substance. *Brown*, 171 Mont. at 45-46, 560 P.2d at 536. Of paramount importance is the similarity of facts between the case now before this Court and *Brown*. Both involved amendments from "bodily injury" to "reasonable apprehension of bodily injury." *Brown*, 171 Mont. at 43, 560 P.2d at 534. In *Brown*, even where the amendment occurred 34 days prior to trial, this Court held it was indeed an amendment as to substance, and improper. *Brown*, 171 Mont. at 45, 560 P.2d at 536.

Applying the standards set forth in *Kennedy*, *Brown*, and *Hallam* to the case at hand, it is clear changing the elements of the offense by adding a different subsection of the statute qualifies as an amendment of substance. Subsection (a) of the statute deals with "bodily injury" which is obviously not the same thing as "reasonable apprehension" or fear of bodily injury. Mont. Code Ann. § 45-5-206.

"Therefore once it is determined that an amendment subsequent to pleading is as to matters of substance, the Court need go no further, as that determination is controlling." *Brown*, 171 Mont. at 45-46, 560 P.2d at 535.

Furthermore, unlike *Brown*, where the State was able to argue the change came thirty-four days prior to trial and hence the defendant may have had sufficient notice and opportunity to prepare a defense, in the case at hand the amendment happened at trial, at the end of the trial, and Spotted Eagle had no opportunity to defend against the amended charge.

## II. AN AMENDMENT AS TO SUBSTANCE MUST BE MADE A MINIMUM OF FIVE DAYS BEFORE TRIAL AND AS SUCH, THE STATE'S PROPOSED AMENDMENT WAS UNTIMELY UNDER MONT. CODE ANN. § 46-11-205.

Having established a change in statute subsections is a change in substance, we now must look to the language of the statute in order to gain direction as to *when* substantive changes can be made and *how*.

> (1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the information.
>
> (2) If the court grants leave to amend the information, the defendant must be arraigned on the amended information without unreasonable

> delay and must be given a reasonable period of time to prepare for trial on the amended information.
>
> (3) The court may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

Mont. Code Ann. § 46-11-205.

As the Court held in *Kennedy*:

> The statute . . . unequivocally prohibits a court from accepting a substantive amendment within five days of the trial. An amendment is one of form when the same crime is charged, the elements of the crime and the proof required remain the same and the defendant is informed of the charges against him.

*Kennedy*, ¶ 11, *citing State v. Sor-Lokken*, 247 Mont. 343, 349, 805 P.2d 1367, 1371 (1991).

In the case at hand case, the State's new proposed jury instructions, "3-A" and "4-A," were amendments as to substance as discussed previously. The State was time-barred from making substantive amendments once the trial had begun. Mont. Code Ann. § 46-11-205(1). The State did not seek these amendments until after the close of testimony. (Tr. at 120.)

The State surmised it had not proven Spotted Eagle caused bodily injury beyond a reasonable doubt and so decided to change its theory of the case to better suit the testimony at trial.

## III. AMENDING THE JURY INSTRUCTIONS DURING THE TRIAL VIOLATED SPOTTED EAGLE'S CONSTITUTIONAL RIGHTS BY DEPRIVING HIM NOTICE AND AN OPPORTUNITY TO PREPARE A DEFENSE.

One function of an information is to notify a defendant of the offense charged, thereby giving the defendant an opportunity to defend. *State v. Cardwell*, 187 Mont. 370, 609 P.2d 1230 (1980). This function of the information cannot be dispensed with when the information is amended as to substance. *Cardwell*, 187 Mont. at 374, 609 P.2d at 1233.

In *Cardwell*, the prosecution sought to amend the information without leave of the Court. *See Cardwell*, 187 Mont. at 372, 609 P.2d at 1231. The Appellant successfully argued that even though Mont. Code Ann. § 46-11-403(1) permitted one substantive amendment without leave of the court, it was in fact, unconstitutional under Article II, Section 20 of the Montana Constitution. *Cardwell*, 187 Mont. at 372, 609 P.2d at 1232. This Court declared the statue unconstitutional, as permitting a substantive amendment to the information without judicial review and dismissed the information. *Cardwell*, 187 Mont. at 375, 609 P.2d at 1234.

A slightly later case, *Sorenson* cites *Cardwell* and notes *Cardwell* identified the requirement "rooted in the due process clause" that criminal defendants are entitled to notice of the charge against them and the opportunity to prepare a defense. *State v. Sorenson*, 190 Mont. 155, 163-64, 619 P.2d 1185 (1980). In

*Sorensen*, the defendant argued the *Cardwell* rule applied, but the Court held the procedural safeguards had been met. *Sorenson*, 190 Mont. at 164, 619 P.2d at 1190.

While the facts in *Cardwell* concerned an information that was amended without proper leave of the court and an unconstitutional statute, the same premise applies. Spotted Eagle has the right to be informed of the charges against him and has to be given an opportunity to defend against those charges. Spotted Eagle prepared a defense for the charge of inflicting "bodily injury" under subsection (a) and the State changed the charge to include subsection (c), adding an additional element to the crime.

Spotted Eagle was not afforded the opportunity to be arraigned on the new element of the offense much less given time to prepare a defense or even call or cross-examine witnesses as to that particular element. Amending charges in such a way deprived the defendant of his due process rights under both the Due Process Clause of the United States Constitution and Article II, Section 20 of the Montana Constitution.

## CONCLUSION

Spotted Eagle respectfully requests this Court reverse his conviction for Partner Family Member Assault, third or subsequent offense, and remand the case to the district court for a new trial on the grounds the State's last minute

amendments to the Jury Instructions were of a substantive nature. As substantive amendments, they were not requested five days prior to trial. No notice was given to the Defendant and the amendments deprived Spotted Eagle of his constitutional rights, the opportunity to be properly advised of the charges and evidence against him, and the opportunity to mount a defense.

Respectfully submitted this 4th day of June, 2010.

By: _____
Ethan C. Lerman
Attorney for Appellant

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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ETHAN C. LERMAN

## APPENDIX